In our view whether she is successful or not the rule is that the costs properly incurred in bringing her suit before the court, or in defending the attack made on her, ought to be paid by her husband. Every member of the Court of Appeal in *Kemp-Welch* v. *Kemp-Welch*[4] adopted the view that Brett L.J. (in the case of *Robertson* v. *Robertson*[5]) was perfectly right when he said it was a matter of high policy and high propriety that the husband should pay the wife's costs of defending a proceeding against her in the Divorce Court.

In the Divorce Court the wife is entitled to defend herself at her husband's expense. If he has not paid the wife's costs of the first petition she is put in greater difficulty in defending the second petition.

Warrington L.J. in *Silver* v. *Silver & Greenfell*[6] said (at p. 172):

"I agree with the learned president that it is a rule of the Divorce Division, and the repeated decisions of the Court of Appeal, first of all in *Robertson* v. *Robertson*, and later in *Kemp-Welch* v. *Kemp-Welch & Crymes* and *Sanders* v. *Sanders*, make it clear that it is at the option of the wife, who is made a respondent by her husband to a petition for dissolution of the marriage, to claim that proceedings in the suit shall be stayed until her costs have been provided for, and if there has been an abortive trial that the second trial shall not proceed until the costs of the first trial have been paid. That is the right of the wife. If any authority were wanted for that proposition it is found in the judgments of each of the Lords Justices in *Kemp-Welch* v. *Kemp-Welch & Crymes*, and I particularly refer in that connection to the judgment of Kennedy L.J. It is not a matter of discretion; the discretion which the court has is over the costs themselves; but when once the costs have been ordered to be paid and it is a question of staying further proceedings until those costs have been paid, that is the right of the wife; but that right may be lost just as any other right of a litigant may be lost by proceedings which the court holds amount to an election not to insist on that right, and to have brought about by that election a course of action on the part of the other side upon the assumption that the strict rights would not be insisted upon."

Counsel for the appellant also made the point that the learned Chief Justice had failed to take into consideration the appellant's inability to pay the costs of the previous proceedings as attributable to his misfortune rather than his fault. The short answer to this is that if he can find funds for himself for two suits he cannot escape the obligation of placing his wife in an equally favourable position.

We were of the view that there being in this case an order for payment of costs in the first suit, it is right and in accordance not only with the practice of the Divorce Court but also of general judicial discretion that the wife in the present case should not be put to further trial without her costs of the first trial being paid.

We accordingly dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *David Marshall; Advani & Hoo.*

COMPTROLLER OF INCOME TAX v. B.S. PTE. LTD.

[O.C.J. (Chua J.) May 16, 1978]
[Singapore — Motion in Suit No. 654 of 1978]

Revenue Law — Dispute as to tax payable by company — Company in voluntary winding up — Writ of summons taken out by Comptroller — Appeal by company to Board — Application for order that writ be stayed until appeal heard by Board — Income Tax Act (Cap. 141), ss. 86 & 90 — R.S.C. 1970, O. 14.

The defendant company was incorporated on December 31, 1971 and on July 19, 1972, the members resolved that the company should be voluntarily wound up. A notice of the winding up of the company and calling for creditors to submit particulars of their claim by August 22, 1972 was published in the newspapers on July 22, 1972. No proof of debt had been lodged by the plaintiff in respect of the present claim. The plaintiff assessed the company to tax for the year of assessment in the sum of $11,602,014. The company's application to the plaintiff for the said assessment to be reviewed and revised was rejected. The company then filed with the Income Tax Board of Review (hereinafter called the Board) a Notice of Appeal. On March 3, 1978 the plaintiff issued a writ claiming $11,602,014 arrears of tax and penalty for non-payment of tax amounting to $580,100.70 making a total claim of $12,182,114.70. The plaintiff then applied on March 11, 1978 for judgment under Order 14. The company prayed for an order that the writ be stayed until the appeal had been heard by the Board.

Held: (1) the court had power to stay proceedings against a company after a voluntary winding up had commenced. The onus lay on the liquidator to show that an action against the company should be stayed. In an application of this kind the court has a discretion and the court would not normally order a stay of action unless the liquidator could show some sufficient reason to justify such interference;

(2) in a voluntary winding up, after the winding up had begun, a creditor of a company had an option as to his remedy for the purpose of enforcing a claim which he had against the company;

(3) in this case to allow a stay would defeat the clear intention of Parliament and every unwilling taxpayer could circumvent section 86 of the Income Tax Act by just lodging an objection and could thereby caused considerable delay in the collection of the tax. The proper course for every aggrieved taxpayer was to pay his tax and present his arguments against the assessment made upon him before the Board.

Cases referred to:-

(1) *Re Norper Investments, Pty. Ltd.* 15 A.L.R. 603.

(2) *Comptroller of Income Tax* v. *R.S.T.* [1962] M.L.J. 216.

(3) *Comptroller of Income Tax* v. *A. Co. Ltd.* [1966] 2 M.L.J. 282.

(4) *Sun Man Tobacco Co. Ltd.* v. *Government of Malaysia* [1973] 2 M.L.J. 163.

MOTION IN SUIT.

C. Darvall Q.C. (*A.P. Godwin* with him) for the applicant/defendant.

Nand Singh Gandhi (State Counsel) for the respondent.

Chua J.: The defendant in this case, disputing it owes $12 million in tax arrears plus penalties claimed by the plaintiff, the Comptroller of Income Tax, applies to this court for an order that the writ of summons be stayed and that the plaintiff be restrained from taking any further step in this suit until further order of the court.

The following facts are not in dispute. The defendant company (the company), was incorporated on

December 31, 1971, and on July 19, 1972, the members resolved that the company should be voluntarily wound up. A notice in the usual form of the winding up of the company and calling for creditors to submit particulars of their claim by August 22, 1972, was published in *The Straits Times* issue of July 22, 1972. No proof of debt has been lodged by the plaintiff in respect of the present claim. By notice of assessment dated November 19, 1975, the plaintiff assessed the company to tax for the year of assessment 1973 in the sum of $11,602,014. The company then applied to the plaintiff for the said assessment to be reviewed and revised. The plaintiff issued a demand note on December 26, 1975. By letter dated July 25, 1977, the plaintiff replied that he did not propose to amend the said assessment. In consequence of this reply the company filed with the Income Tax Board of Review (the board) on July 27, 1977, a notice of appeal. A petition of appeal was filed with the board on August 22, 1977, appealing against the assessment on the basis of which this action has been brought. On March 3, 1978, the plaintiff issued the present writ claiming $11,602,014 arrears of tax and penalty for non-payment of the tax assessed as per the demand note dated December 26, 1975, amounting to $580,100.70 making a total claim of $12,182,114.70. The plaintiff then applied on March 11, 1978, for judgment under Order 14. On March 13, 1978, the company filed the present motion praying for an order that the writ of summons herein be stayed and the plaintiff be restrained from taking any further step in the suit until further order of the court. The application of the plaintiff under Order 14 was adjourned *sine die*.

The main ground on which counsel for the defendant urges the court to stay the High Court action is that there is at the moment an appeal by the company against the plaintiff pending before the board. The company is disputing liability and the entire amount of the taxes assessed and there are substantial issues of fact and law to be decided and the board is the right tribunal which should first deal with the appeal and make its determination. The board is seized of the matter and the board is specifically charged by the legislature with the function of determining, upon appeal, the liability or otherwise of a tax payer in reference to the assessment of income tax. Counsel for the defendant submits that the action should be stayed until the board has heard the appeal and the result of the appeal is known.

In support of the application counsel for the defendant cited the Australian case of *Re Norper Investments Pty. Ltd.*[1] The company was a private company for income tax purposes. In November 1975, the company, having been assessed under the Income Tax Assessment Act to undistributed profits tax, lodged an objection to the assessment. From the rejection of that objection the company appealed to the Supreme Court of New South Wales. In July 1976, the Commissioner served upon the company a notice of demand under the Companies Act, 1961. In January 1977, the Commissioner, despite the fact that he had not yet complied with his statutory duty to refer the company's objection to the Supreme Court pursuant to section 188(1) of the Income Tax Assessment Act, issued a petition for the winding-up of the company out of the Equity Division of the Supreme Court of New South Wales. The petition was based on the amount due under the disputed assessment to undistributed profits tax and an amount of additional tax imposed for late payment. It was held that the petition should be dismissed because

"(i) There exists in the trial judge, a discretion to grant or refuse a stay of proceedings on the ground that appeal proceedings are pending; (ii) If the court is satisfied that the company has a substantial argument that the assessment should be set aside entirely, a stay could properly be granted; (iii) It would be 'not just' to make a winding up order in circumstances where the petitioner is in breach of his duty under the Income Tax Assessment Act. The petition was oppressive and the proceedings, therefore, an abuse of process."

The plaintiff does not dispute that the court has jurisdiction in this case to grant a stay but submits that in the circumstances of this case the action ought not to be stayed.

It is clear from the authorities that the court has power to stay proceedings against a company after a voluntary winding-up has commenced. The onus lies on the liquidator of showing that an action against the company should be stayed. In an application of this kind the court undoubtedly has a discretion and the court will not normally order a stay of action unless the liquidator can show some sufficient reason to justify such interference. Each case must depend on the surrounding circumstances.

Now what are the circumstances of this case. It is said that a point which the court should take into consideration is that the plaintiff had not lodged a proof of debt with the liquidator. The law is clear that in a voluntary winding-up, after the winding-up has begun, a creditor of a company has really an option as to his remedy for the purpose of enforcing a claim which he has against the company. He may either issue a writ, subject to the chance of that action being stayed on good grounds, or he may prove in the winding-up.

The present case is not an ordinary case. Under the Income Tax Act (Reprint of Cap. 141), (the Act), it is clearly provided that the amount of tax raised in an assessment is due and payable at the expiry of the prescribed period notwithstanding any objection or appeal against the assessment. Section 86 of the Act provides:

"Subject to the provisions of section 91 of this Act, tax for any year of assessment levied in accordance with the provisions of section 42 or 43 of this Act shall, notwithstanding any objection or appeal against the assessment on which the tax is levied, be payable at the place stated in the notice given under section 76 of this Act within one month after the service of the notice:

Provided that the Comptroller may in his discretion extend the time limit within which payment is to be made."

It is provided by section 50 of the Act that tax and any penalty may be sued for and recovered in a court of competent jurisdiction by the plaintiff in his official name with full costs of suit from the person charged therewith as a debt due to the Government.

It is clear, therefore, that sections 86 and 90 of the Act provide the plaintiff with a complete cause of action in this case. The tax has become payable, notwithstanding the appeal against the assessment that

is pending and the plaintiff is empowered to sue for and recover payment thereof in this court. (see *Comptroller of Income Tax* v. *R.S.T.*;[2] *Comptroller of Income Tax* v. *A. Co. Ltd.*;[3] *Sun Man Tobacco Co. Ltd.* v. *Government of Malaysia*[4]).

As I have said this is not an ordinary case. Here is a case where clearly the plaintiff is entitled to judgment.

Before the coming into operation of section 86 it was provided in section 85 (which has been repealed) that "collection of tax shall, in cases where notice of an objection has been given, remain in abeyance until such objection or appeal is determined." When section 85 was repealed and section 86 was enacted it was clearly the intention of the legislature that collection of tax should not be held over pending the determination of the appeal and to make provision for the speedy collection and recovery of taxes.

It seems to me that in this case to allow a stay would defeat the clear intention of Parliament and every unwilling taxpayer can circumvent section 86 by just lodging an objection and thereby causing considerable delay in the collection of the tax. The proper course for every aggrieved taxpayer is to pay his tax and present his arguments against the assessment made upon him before the board.

The case of *Norper Investments* was decided on the circumstances of that case. In that case when the Commissioner rejected the objection to the assessment the company requested the Commissioner to treat the objection as an appeal and to forward it to the Supreme Court. The Commissioner failed to comply with his statutory duty to refer the company's objection to the Supreme Court. Instead he issued a petition out of the Supreme Court for the winding-up of the company, not a writ to enforce the assessment. The court undoubtedly has a discretion whether to make a winding-up order. The court held that it would be "not just" to make a winding-up order in circumstances where the petitioner was in breach of his duty under the Income Tax Assessment Act and that the petition was oppressive and the proceedings, therefore, an abuse of process and the court dismissed the petition with costs.

I have given this case my full consideration and I have come to the conclusion that the defendant's application for a stay of proceedings in the action must be refused.

The motion is dismissed with costs.

Motion dismissed.

Solicitors: *Donaldson & Burkinshaw.*

THE "COURAGEOUS COLOCOTRONIS" E.M.J. COLOCOTRONIS & ORS. v. EUROPEAN AMERICAN BANKING CORPORATION & ORS.

[O.C.J. (Kulasekaram J.) May 25, 1978]
[Singapore — Admiralty in Rem No. 472 of 1977]

Practice and Procedure — Arrest of ship — Affidavit defective — Nature of claim not disclosed in affidavit leading to warrant of arrest — Arrest a nullity — Amended writ — Similar claim — R.S.C. 1970, O. 2, O. 70 r. 4(6)(b).

Shipping Law — Arrest of ship — Nature of claim not disclosed in affidavit leading to warrant of arrest — Arrest a nullity — R.S.C. 1970, O. 2, O. 70 r. 4(6)(b).

The plaintiffs issued a warrant of arrest against the ship "Courageous Colocotronis" on November 22, 1977. The affidavit leading to the warrant of arrest alleged that the plaintiffs were the sole beneficial owners of the said vessel as they held all the shares of "Navegantes" a company which was the registered legal owner of the said vessel. The defendant bank were a New York banking corporation which had financed "Navegantes" in the sum of US$6,600,000 on a loan agreement for the purchase of the said vessel supported by the mortgage of the ship by "Navegantes" to the defendants and in addition the personal guarantee of the plaintiffs. They had entered a conditional appearance and sought to have the writ struck out on the grounds, *inter alia*, that the writ, affidavit leading to the warrant of arrest and the warrant of arrest were defective in law. Another corporation, U.M.T.T. who claimed to be the present owners of the said vessel having purchased it from R.T.C. who had in turn purchased it from "Navegantes" also entered a conditional appearance and made a similar application to that of the defendant bank. The plaintiffs applied to amend the writ of summons and this was granted. The amended writ stated that the plaintiffs as shareholders of the company "Navegantes" brought the action for the benefit of the company for a declaration that the said vessel was legally owned by the company.

Held, setting aside the warrant of arrest: (1) Order 2 of the Rules of the Supreme Court, 1970 was designed to save rather than destroy and to cure that which was capable of cure in matters arising out of non-compliance with the rules provided the failure to comply with the rules was not so serious as to be contrary to natural justice and to render the proceedings in which they occurred or any order made under it a nullity;

(2) the statement of the nature of the claim in the affidavit leading to the warrant of arrest in this case was bad in law. The affidavit should state the nature of the claim of the plaintiffs as the defendants whose interests in the ship would be affected by the arrest and detention of the ship should know why their rights and interests were being invaded;

(3) in this case the nature of the plaintiff's claim was not brought home to the defendants at the time of the arrest. The issue of a warrant of arrest under such circumstances would be contrary to natural justice.

Cases referred to:-

(1) *The "Hoe Lee"* [1970] 1 M.L.J. 45.
(2) *In re Pritchard, deceased* [1963] 1 Ch. 502.
(3) *The "Simba"* [1970] 1 M.L.J. 121.

ADMIRALTY *IN REM.*

Denis Murphy (*Raj Kumar* with him) for the plaintiffs.

P. Selvadurai for the European American Banking Corporation.

S. Selvadurai for United Maritime No. 2 Tanker Transport Inc.

Kulasekaram J.: The plaintiffs Minos Colocotronis and his 2 nephews Alexander Georgiadis and Antony Georgiadis commenced an Admiralty Suit in Rem No.